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DEPARTMENT OF JUSTICE
PORTLAND OFFICE

MEMORANDUM

DATE: October 21, 1996

TO: Interested Persons

FROM: Shelley K. McIntyre
Assistant Attorney General

RE: APA Standing Issues/Local 290 Opinion
DOJ File No. 340-990-GNM0262-96

This memo addresses issues raised by a letter dated August 1, 1996 sent by attorney Karl Anuta to the Environmental Protection Agency (EPA) asking that EPA revoke delegation of Oregon's air and water programs[1] because of a recent Oregon Supreme Court opinion. In ***Local 290, Plumbers and Pipefitters v. Dept. of Environ. Quality***, SC 42666 July 18, 1996 (***Local 290***), the court ruled that Oregon's Administrative Procedures Act (APA) does not allow so-called representational standing. That is, the APA does not allow an organization that cannot show injury to itself to seek judicial review of an agency action on behalf of its allegedly injured members.

The federal law concerning both the NPDES and Title V permit programs expressly requires that states allow judicial review of state-issued permits, although the requirements for each program are slightly different. Up to now, EPA has focused on how states address the nature of a citizen's alleged *injury*. The person seeking review has not been the issue. EPA has insisted that states provide standing to citizens that can show injury to health or to aesthetic, environmental, or recreational interests; states may not limit standing to applicants or persons with only a pecuniary interest.

However, representational standing in state court conceivably is a new issue for EPA. Federal courts have recognized representational standing since at least the 1950s, and it presently is taken for granted at the federal level.

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[1] Although the letter is not specific, we assume Mr. Anuta means Oregon's 402 or NPDES permit program under the Clean Water Act and the Title V operating permit program under the Clean Air Act.

THE LOCAL 290 CASES

Local 290 is a labor organization representing skilled workers in the plumbing and pipefitting trades. Local plumbers and pipefitters' unions have become increasingly active intervenors in environmental permit actions, especially in California, in order to exert pressure on the permittees and to secure more union jobs. *See* Herbert R. Northrup & Augustus T. White, CONSTRUCTION UNION USE OF ENVIRONMENTAL REGULATION TO WIN JOBS: CASES, IMPACT, AND LEGAL CHALLENGES, 16 *Harv. J. Law & Public Policy* 55 (1995). Starting in early 1992, Local 290 began challenging Air Contaminant Discharge Permits (ACDPs), Title V operating permits, and NPDES permits issued by the Department of Environmental Quality (DEQ) to non-union shop facilities.

Under the APA, "[a]ny person adversely affected or aggrieved by an order *or* any party to an agency proceeding is entitled to judicial review of a final order * * *." ORS 183.480(1)(emphasis added). Thus, the APA provides two distinct bases for standing to seek judicial review of an agency decision under the APA. First, any "party" to an agency proceeding has standing by that fact alone, without further showing of interest. *Brian v. Oregon Government Ethics Commission,* 319 Or 151, 159-60 (1994); *Marbet v. Portland Gen. Elect.*, 277 Or 447, 453 (1977). Although the APA does not define "agency proceeding," it clearly includes a contested case hearing on a DEQ-issued permit.[2] Therefore, if an *applicant* challenges DEQ's permit and proceeds through the contested case proceeding, the applicant may seek judicial review of the final order from that proceeding.

Second, even one who did *not* participate in the administrative proceeding may obtain judicial review of an agency order if that person is "adversely affected or aggrieved" by the order. ORS 183.480(1). Thus, if an applicant requests a contested case hearing, it generally is unnecessary for an adversely affected or aggrieved person to intervene in order to obtain

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[2] ORS 468.070(3) provides that the procedure for modification, suspension, revocation or refusal to issue or renew a permit is the procedure for a contested case as provided under the APA. Thus, a permittee may request a contested case hearing for these agency actions. The statute does not address the procedure for challenging the issuance of a permit. However, ORS 468A.040 authorizes the agency to require air contaminant permits and specifically requires that Title V permits be issued pursuant to the rules developed for that program.

DEQ's Title V rules provide for an APA contested case hearing if the permit applicant contests the permit terms and also allow any "adversely affected or aggrieved person" to petition to intervene. OAR 340-28-2300(4). Further, the Title V permit rules specifically provide that any person who submitted written or oral comments during the public participation process is considered to be "an adversely affected or aggrieved person" for purposes of the APA. OAR 340-28-2290. The intent of this rule was to comply with EPA's Part 70 requirements concerning allowing commenters to seek judicial review if they otherwise satisfy Article III case or controversy requirements.

As for the NPDES permit process, if the applicant is dissatisfied with the conditions of the permit, the applicant may request a hearing before the commission, which will be conducted pursuant to the agency's regulations. OAR 340-45-035(9). OAR 340-11-098 provides that in general, when a decision of the Director is appealed to the commission, a contested case proceeding is initiated. For other than civil penalty assessments, such proceedings are governed by the Attorney General's Model Rules of Procedure, which concern contested case hearings under the APA.

judicial review. Further, even if there is no contested case hearing, one may seek judicial review under ORS 183.484 for review of orders other than from contested cases.

Local 290 is a "person" entitled to judicial review of a final agency order because the definition of that term includes associations and public or private organizations "of any character other than an agency." ORS 183.310(7). DEQ-issued permits are reviewable as "final orders" because they are a "final agency action expressed in writing." ORS 183.310((5)(b).

In the cases at issue, Local 290 was not a "party to an agency proceeding;" there was no contested case hearing. Generally, merely submitting comments on a proposed permit during the public notice period does not automatically entitle a person to judicial review. ***People for the Ethical Treatment v. Inst. Animal Care***, 312 Or 95, 105 (1991). Therefore, the Union had to allege facts sufficient to show that it was "adversely affected or aggrieved" by DEQ's action. It lost this issue in the court of appeals and did not appeal it to the supreme court. ***Local No. 290 v. Dept. of Environ. Quality***, 136 Or App 213 (1995).[3]

However, the court of appeals also held that representational standing is permitted under the APA, but the facts before the court were insufficient to determine whether the members could qualify for standing as individuals, and whether the union was authorized to represent the members' position. *Id.* at 218-219. The supreme court allowed petitions for review of the issue of representational standing and ruled that this is impermissible under the Oregon APA, relying on a narrow reading of ORS 183.484(3).[4]

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[3] Local 290's petitions claimed standing in two respects: (1) for itself (direct standing), and (2) on behalf of its unnamed members (representational standing) by alleging that both it and its members will be adversely affected or aggrieved by the activities allowed under the permits. The Union asserted direct standing because the permits allegedly will allow increased pollution in the affected areas, which will limit job opportunities and harm the health of those union members who live in the area. In turn, according to the Union, dues will decrease and certain training and health and welfare trusts will suffer negative impacts.

The Union asserted representational standing because certain of its members live in the area of the permitted sources, and those individuals allegedly will suffer adverse effects from the facilities. These adverse effects include increased pollution, damage to health, lost property values, and lost recreational activities. The Union contended that if some of its members have standing as individual persons, then it has standing on behalf of those members.

In circuit court, DEQ moved for summary judgment on the grounds that Local 290 lacked standing as an organization in its own right (it lacked direct standing), and also as a representative standing in the shoes of its members (it lacked representational standing). Two different trial courts ruled in favor of DEQ and dismissed the cases.

Local 290 appealed, the two cases were consolidated for argument, and the court of appeals reversed and remanded in part. It found that the union itself was not "adversely affected or aggrieved." The union's assertions of loss of job opportunities, with resulting loss of union dues, were too "ephemeral and speculative" to show the requisite "direct injury to a substantial interest." *Local No. 290 v. Dept. of Environ. Quality*, 136 Or App 213, 216-217 (1995). It therefore lacks direct standing to challenge the permits.

[4] Although in other cases the court has endorsed the concept that an organization can assert the rights of its members, those were not brought under the provisions of the APA.

This section concerns judicial review of orders in other than contested cases, which applies because there was no contested case hearing. It requires that the petitioner state facts "showing how the petitioner is adversely affected or aggrieved by the agency order * * *." ORS 183.484(3). The supreme court concluded that

> [it] makes no mention of 'representational' standing, and the statutory context does not support such an inference. Indeed, that statute requires that the person bringing the petition show how that person is adversely affected or aggrieved. We are admonished not to add to a statute words that the legislature has omitted. In order to grant standing to the Union in these cases, we would have to violate that tenet of statutory construction, by adding a provision that a petition is sufficient if, although the petitioner is neither adversely affected nor aggrieved, the petitioner claims to be acting on behalf of another person who does meet one of those two criteria. (emphasis in original)

Slip opinion at 8-9.

"STANDING" REVIEWED

Standing determines who is entitled to judicial review. Beyond that simple statement, however, the law is a complex maze of sometimes inconsistent analyses and holdings at both federal and state levels. Furthermore, federal and state law have different considerations in deciding standing, even though they sometimes use the same words.

Federal courts are courts of limited jurisdiction. That is, Article III of the federal Constitution places limits on the jurisdiction of federal courts. Most discussions of standing under federal law concern the limits imposed by "case or controversy" requirement of Article III, § 2.[5] The Article III "case or controversy" requirement means that a party invoking the court's authority show that he personally has suffered some actual or threatened injury as a result of the defendant's allegedly illegal conduct, and that the injury be amenable to judicial

[5] Under federal law, there are both constitutional limits on federal court jurisdiction and prudential limits on its exercise, and the courts often blend the two. In addition, there is a substantial body of case law interpreting standing under the federal APA. Basically, federal law on standing is not easy to reconcile factually, and it fails to provide a coherent approach to defining the scope of judicial power.

remedy. ***Valley Forge v. Americans United***, 454 U.S. 464, 470-475 (1981). This is the injury-in-fact test.[6]

Inherent in the personal injury requirement is that one cannot assert the rights of another. However, a relatively recent development in the law of standing is what federal courts refer to as representational or associational standing. Federal courts currently recognize associational or representational standing, even if the organization itself is not injured, when: (1) the members would have individual standing to sue; (2) the interests the organization seeks to protect are related to its goals; and (3) the claims do not require individual participation by the members. ***See Pennell v. San Jose***, 485 US 1, 7 (1987), ***Hunt v. Washington Apple Advertising Comm'n***, 432 US 333, 341-345 (1977), ***Warth v. Seldin***, 422 US 490, 511 (1975), ***NRDC v. Texaco Refining and Marketing, Inc.***, 2 F.3d 493, 504, 37 ERC 1305, 1314 (3d Cir. 1993).[7]

On the other hand, in Oregon, the *legislature* grants standing for judicial review. Federal Article III limits are not relevant. Therefore, state courts look to the text and context of the statute granting standing. Different statutes may confer standing in different circumstances or to different persons, and it is unwise to try to apply the standards of one statute to the standards of a different statute. At issue here is the Oregon APA.

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[6] Although historically this included only economic injuries, federal law now recognizes "noneconomic" values, such as aesthetic, conservational and recreational claims. *Sierra Club v. Morton*, 405 U.S. 727 (1972). It is this latter expansion of the law of standing that EPA has focused on in its recent directives to states and litigation regarding judicial review. We discuss this in more detail below.

[7] It is difficult to find an explanation in the cases themselves of this development. During the Civil Rights era of the late 1950s and 60s, the Supreme Court allowed the NAACP to assert its members' *constitutional* rights, especially if it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. This was particularly true in the First Amendment area where statutes threatened to inhibit free expression or association. *See, e.g., NAACP v. Button,* 371 US 415 (1963). Also, in a two-page *per curium* decision, the Supreme Court found that an association of motor carriers, authorized under the Interstate Commerce Act to represent member carriers in proceedings before the Interstate Commerce Commission, had standing to challenge an ICC order concerning freight rates. *National Motor Freight Traffic Association, Inc. v. United States,* 372 US 246 (1963).

The later decision that the Sierra Club could assert an "injury-in-fact" to itself under the federal APA merely by alleging that some of its members would be adversely affected by the agency action refers to the earlier civil rights cases. The Court stated "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 US 727, 738 (1972), *citing NAACP v. Button, supra.* The leap from allowing an association to assert its members' constitutional rights and allowing statutorily established associations to represent their members to allowing almost any organization to represent almost any interest of its members is unexplained in any cases we could find. We suggest that this was the result of the generally expanding doctrine of judicial review of agency actions at the time.

FEDERAL REQUIREMENTS FOR JUDICIAL REVIEW OF STATE-ISSUED PERMITS

1. Statutory Requirements

As regards Title V operating permits, the federal Clean Air Act (CAA) requires states to provide

> an opportunity for judicial review in State court of the final permit action by the applicant, *any person who participated in the public comment process*, and any other person who could obtain judicial review of that action under applicable law.

42 USC § 7661a(b)(6). Federal regulations, EPA written guidance, and court opinions have refined and interpreted this requirement, as discussed below in the section on federal regulations.

The Clean Water Act (CWA) does not contain an equivalent provision. If a state wishes to administer its own permit program for discharges of pollutants, it only has to submit to EPA a "description of the program it proposes to establish and administer under State law * * *." 33 USC § 1342(b). EPA must approve such a program unless it finds that the program fails to meet certain criteria stated in section 1342(b). Although one of the requirements is public notice and an opportunity for public comment on any proposed permit, there is no express judicial review requirement imposed on state programs.

The CWA *does* require that "any interested person" may obtain judicial review in the United States Court of Appeals if *EPA* issues or denies any NPDES permit. EPA's proposed regulation on judicial review of state-issued NPDES permits imposed this requirement on the states. 61 *Fed. Reg.* 20972, 20974 (May 8, 1996). But EPA changed its mind, and the final regulation is based on a different provision requiring that both the EPA and the states provide for, encourage and assist public participation in the development of "any regulation, standard, effluent limitation, plan, or program established under the Act." 33 USC § 1251(e). Again, we discuss this requirement more thoroughly below.

2. Federal Regulations

a. ***Pursuant to the Clean Air Act***

The EPA regulations for Title V operating permit programs require state programs to include a legal opinion from the state's attorney general that the state has adequate legal authority to, among other things,

> Provide an opportunity for judicial review in State court of the final permit action by the applicant, *any person who participated in the public participation process provided pursuant to § 70.7(h)*, and any other person who could obtain judicial review of such actions under State laws.

40 CFR § 70.4(b)(3)(x) (emphasis added). However, during the program approval process, this provision, which merely mimics 42 USC § 7661a(b)(6), quoted above, generated substantial controversy. The provisions appeared to require a state to provide an opportunity for judicial review to persons who commented on a permit application but who were not "injured" by the final agency action. Some people believed this was unreasonable because it extended standing beyond the requirements for judicial review in federal court of an EPA-issued permit.

EPA subsequently explained that the judicial review provisions must be read to require a state to provide access to judicial review to any commenter who meets the injury-in-fact standard under Article III's threshold standing requirements, as established in case law, specifically citing ***Sierra Club v. Morton***, 405 U.S. 727, 734-35 (1972). *See* LETTER dated December 29, 1992 from John R. Barker, Regional Counsel, EPA Region IV to Daniel F. McLawhorn (BARKER LETTER). The important thing to EPA was that the "injury" must include harm to aesthetic, environmental, or recreational interests, provided that the party seeking review is among the injured.

EPA later disapproved the State of Virginia's proposed Title V permit program because, among other failings, the proposed program contained inadequate judicial review provisions. Under Virginia law, although a permittee could challenge the issuance or denial of a Title V permit, the public was severely restricted. A member of the public who is aggrieved by a final permitting decision and who participated in the public comment process could seek judicial review of the decision *only if* he met the basic Article III standing requirements *and* if the injury was "an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized." Va.Code § 10.1-1318(B). EPA determined that this "pecuniary and substantial interest" standard violates the federal Act's requirements. In ***Virginia v. Browner***, 80 F.3d 869 (4th Cir. 1996), the court of appeals agreed.

b. ***Pursuant to the Clean Water Act***

The federal regulations contained in 40 CFR Part 123 establishing minimum requirements for federally-authorized state permit programs under section 402 of the CWA do not address judicial review requirements. However, at about the same time that Virginia filed its deficient Title V permit program, environmental groups petitioned EPA to withdraw the Virginia State 402 (NPDES) permit program, citing a limitation on citizen standing,

among other alleged deficiencies. Virginia law governing permit appeals under the water program had the same limitations as those found lacking under the air program.

EPA subsequently discovered that several states' laws limited the opportunity for judicial review of state-issued permits to such a degree that it was substantially narrower than that allowed under section 509 of the federal Act to challenge federally-issued permits. Therefore, the agency decided it was necessary to specify the standing requirements in Part 123.

On May 8, 1996, EPA published its final rule amending 40 CFR Part 123, adding a new section setting forth the minimum judicial review requirements that states must meet in order to maintain authorization to issue NPDES permits under section 402 of the Clean Water Act.[8] 61 *Fed Reg* 20972; 40 CFR § 123.30. EPA's stated objective is to require states to

> provide an opportunity for judicial review in State Court of final permit decisions (including permit approvals and denials) that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard where State law allows an opportunity for judicial review that is equivalent to that available to obtain judicial review in federal court of federally-issued NPDES permits. A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of State-issued permits.

61 *Fed. Reg.* at 20972. EPA's preamble discusses the importance of citizen participation in the permitting process and notes that

> when citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be seriously compromised. * * * Without the possibility of judicial review by citizens, public participation before a State

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[8] 40 CFR § 123.30 Judicial review of approval or denial or permits.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see §509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). This requirement does not apply to Indian Tribes. 61 *Fed Reg* 20972, 20980.

> administrative agency could become a paper exercise. State officials will inevitably spend less time considering and responding to the comments of parties who have no standing to sue, but will be more attentive to the comments of parties who can challenge the administrative decision in court.

61 *Fed. Reg.* at 20973. EPA noted that the court of appeals had quoted from EPA's March 17, 1995 proposed rule to support its decision upholding EPA's denial of Virginia's proposed Title V program. As stated by the court, "[t]he comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him." 61 *Fed. Reg.* at 20973, quoting ***Virginia v. Browner***, 80 F.3d at 880.

As in the conflict with Virginia over its Title V permit program, EPA's focus on this rule was on the nature of the injury, not in the entity seeking judicial review.

> With respect to the nature of the injury that an "interested person" must show to obtain standing, the Supreme Court held in ***Sierra Club v. Morton***, 405 U.S. at 734-35, that harm to an economic interest is not necessary to confer standing. Harm to an aesthetic, environmental, or recreational interest is sufficient, provided that the party seeking judicial review is among the injured. This holding was most recently reaffirmed by the Supreme Court in ***Lujan v. Defenders of Wildlife*** ("[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing.").

60 *Fed. Reg.* at 14590; 61 *Fed. Reg.* at 20975 (citations omitted).[9]

In explaining how a state can meet the public participation requirement of section 101(e) and, hence, the new rule, EPA stated

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[9] EPA's proposed rule required states to provide the opportunity for judicial review to "any interested person." 60 *Fed. Reg.* 14588 (March 17, 1995). That language came from section 509(b)(1), which provides that "any interested person" may challenge federally-issued permits in federal court. Furthermore, "[t]he legislative history of the CWA states explicitly that the term 'interested person' in section 509(b) is intended to embody the injury in fact rule of the federal Administrative Procedure Act, as set for by the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972)." 60 *Fed. Reg.* at 14590 (citations omitted).

Although EPA preferred the "any interested person" language because it tracks section 509(b)(1) of the CWA, the agency changed that language for the final rule. EPA decided to adopt

> a more flexible, functional test that is tied directly to the mandate of § 101(e). * * * A State certainly will meet this standard if it allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit.

61 *Fed. Reg.* at 20975.

> If State law does not allow broad standing to judicially challenge State-issued NPDES permits — including standing based on injury to aesthetic, environmental, or recreational interests — the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose. * * * At a minimum, ordinary citizens should be in a position of substantial parity with permittees with respect to standing to bring judicial challenges to State permitting decisions.

Id. Thus, the emphasis was on giving citizens who may be injured in other than economic or merely pecuniary ways the opportunity to challenge state-issued permits. Nothing in either of the preambles discusses whether states must allow organizations to challenge permits on behalf of individual citizens.

OREGON'S APA IN RELATION TO FEDERAL LAW

There is no express federal requirement for representational standing, and Oregon law likely meets the required injury-in-fact test. In a letter to EPA accompanying DEQ's Title V program submittal, this office attested that Oregon's standard for judicial review of state-issued permits meets the minimum Article III standing requirements. All the cases that EPA cited in its letter concerning Title V's standing requirements, as well as those cited in the preambles for the new CWA judicial review rule, concern the "injury-in-fact" standard. That is, the person who invokes the court's authority must show personal actual or threatened injury, no matter how slight.

As stated above, Oregon's APA provides, in part:

> Any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.

ORS 183.480(1). The term "adversely affected or aggrieved" is not self-explanatory, nor does the statute define it. The legislative history is unhelpful because there was little discussion of the phrase when it was added to the APA in 1971.[10]

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[10] Pre-1971, the statute provided a right of judicial review only to a "party to an agency proceeding aggrieved by a final decision in a contested case * * * ." Thus, if a person were substantially aggrieved by the enforcement of an administrative rule, but was not a party to an agency proceeding, the person lacked standing under that provision. ***Ore. Newspaper Pub. v. Peterson***, 244 Or. 116, 120 (1966). The court stated that "[s]tanding grows out of the allegation of a substantial injury directly resulting from the challenged governmental action. One who alleges that he

(continued...)

The Oregon Supreme Court has discussed the term "aggrieved" in several cases. It stated that "'aggrieved' means something more than being dissatisfied with the agency's order, yet distinct from being 'adversely affect by it' * * *," and a "person * * * aggrieved" includes one representing an interest that the legislature wished to have considered. ***Marbet v. Portland Gen. Elect.***, 277 Or 447, 457, 561 P2d 154 (1977).[11]

In ***People for Ethical Treatment v. Inst. Animal Care***, 312 Or 95, 101-102, 817 P2d 1299 (1991) (***PETA***), the court summarized its previous discussions of "aggrieved," concluding that a person is aggrieved if the person shows one or more of the following factors:

> (1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature wished to have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding. The legislature has not granted standing under ORS 183.480(1) to those persons who merely are 'dissatisfied with the agency's order' or who have only an 'abstract interest * * * in the question presented,' or who are mere bystanders. 'The advocacy of those who have something at stake in the outcome of * * * [an agency proceeding] is far more helpful to a court of law than are the academic speculations of bystanders.' (Citations omitted.)

Therefore, both federal Article III limitations and Oregon APA standing are based on the "injury-in-fact" standard discussed in ***Sierra Club v. Morton*** and subsequent cases. Federal law requires that the person seeking judicial review show more than mere dissatisfaction with or an abstract interest in an agency order. Further, there must be more than an injury to a cognizable interest. "The 'injury in fact' test requires * * * that the party seeking review be himself among the injured." ***Lujan v. Defenders of Wildlife***, 504 U.S. 555 (1992), *quoting*

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[10](...continued)
is or has been adversely and substantially affected by governmental action should have standing to challenge that action if it is judicially reviewable at all." 244 Or. at 121. Accordingly, the legislature amended ORS 183.480 by adding "any person adversely affected or aggrieved by an order" to make clear that such persons are entitled to judicial review, whether or not they were a party to the proceeding that produced the order. 36 Oregon State Bar, Committee Reports (1970).

[11] ORS 469.380(2) allows the Energy Facilities Siting Council (EFSC) to permit "any person * * * who appears to have an interest in the results of the hearing or who represents a public interest in such results * * * " to intervene in the siting hearing. The court noted that this provision is comparable to the phrase in the federal APA that grants judicial review to persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute.*" (Emphasis added.) In this case, the intervenor's interest was one recognized by the relevant statute. 277 Or at 447 n.4.

Sierra Club v. Morton, 405 U.S. at 734. Both ***PETA*** and ***Local 290*** are consistent with these federal cases.

Regarding the injury-in-fact standard, Oregon courts have not addressed the specific issue of whether aesthetic or environmental harm would meet the "affected or aggrieved" requirement of the APA. However, we see no reason why it would not. The "substantial interest" test comes from ***Ore. Newspaper Pub. v. Peterson***, 244 Or. 116, 121 (1966), where the court stated that "[w]hat is a 'substantial' interest will be, in close cases, a question of degree. A formula to fit all cases does not exist." There is no reason to believe that the Oregon courts would not find aesthetic and environmental concerns related to state-issued air and water permits to be a "substantial interest."

EPA'S AUTHORITY TO REVOKE PROGRAMS

The new federal regulation for the NPDES permit program allows states up to two years, if necessary, to make legislative changes to comply with the judicial review requirement. 61 *Fed. Reg.* at 20972 (effective date June 7, 1996). Therefore, even if EPA asserts that Oregon law is inadequate under the new rule, this is no authority for immediate revocation of Oregon's water program.

Under the Title V program, EPA may withdraw program approval whenever the approved program no longer complies with the requirements of the Part 70 regulations, and the permitting agency fails to take corrective action. 40 CFR § 70.10(c)(1). This includes if a court strikes down or limits state authority to administer or enforce the state program. *Id.* To do so, EPA must follow specific procedures, including giving notice to the permitting authority and allowing the authority to correct the problem. 40 CFR § 70.10(b). Therefore, if EPA determines that *Local 290* renders Oregon's standing provisions inadequate under Title V, it may not simply revoke the program.

SM:kt/SKM0431.MEM
c: Larry Knudsen, DOJ
Susan M. Greco, DEQ